UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

GEORGE G. HARRIS, a/k/a, GEORGE G. HARRIS' WILDLIFE COLLECTION,

Plaintiff,

-vs-

OTC, INC., a/k/a ORIENTAL TRADER'S COMPANY, LAUREN-SPENCER, INC., SHIRLEY LEE, BOWEN LEE, a/k/a LEE BOWEN, DANIEL LEE and POPPHIE LEE, individually,

Defendant.

Civil Action No.
C2-04-884

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS ON COUNTS 2, 3, 4, 5, AND 6.

INTRODUCTION

This motion, like that of Defendants' motion for lack of subject matter jurisdiction, should be summarily dismissed due to the timing of these motions alone. These types of motions are typically made at the onset of litigation, not on the eve of trial. The resources wasted on these "eleventh hour" motions typify the tactics employed by Defendants throughout this litigation, and provide additional support for Plaintiff's contemporaneous motions for Defendants' failure to comply with its discovery obligations among other deficiencies. Bottom line, Defendants have no defense to its infringing conduct, and are seeking to delay the inevitable.

Plaintiff's Complaint asserts the following causes of action: 1) copyright infringement, 2) Lanham Act violations, 3) accounting, 4) unfair competition, 5) fraud/misrepresentation, and 6) direct molding, as a result of Defendants unlawful copying, use, and sale of Plaintiff's original works of authorship embodied in Plaintiff's pewter dog pins ("Dog Jewelry" or "Works"). Defendant now seeks judgment on the pleadings for all but Plaintiff's copyright infringement claims. For the reasons set forth below, Plaintiff asserts that it has satisfied the liberal pleading requirements for the various causes of action. Therefore Plaintiff's claims satisfy the federal "notice pleading" requirements, and Defendants' motion should be denied.

Defendants argue, contrary to the Federal Rules of Civil Procedure, that judgment on the pleadings should be granted because no set of facts as set forth in the Complaint would warrant the relief requested. This argument is without merit. Defendants are placing a higher burden on Plaintiff than is required under the Federal Rules of Civil Procedure, by holding Plaintiff to a standard more appropriate for summary judgment than a standard for judgment on the pleadings. Plaintiff asserts that it satisfies the requirements for setting for federal "notice pleading," and that Defendant's motion be denied.

JUDGMENT ON THE PLEADINGS STANDARDS

Contrary to the Federal Rules of Civil Procedure, Defendants argue that the Complaint should be dismissed because the factual allegations contained therein do not set forth the elements of each cause of action in meticulous detail. This argument, however, is without merit. Defendants appear to be confusing the standard on a Rule 12(c) motion with that for a Rule 56 motion for summary judgment. The former standard applies and Defendants' motion should therefore be denied.

ARGUMENT

POINT I

THE FACTUAL ALLEGATIONS OF THE COMPLAINT ARE SUFFICIENT TO SATISFY THE LIBERAL "NOTICE PLEADING" REQUIREMENT, THEREFORE DEFENDANTS' MOTION SHOULD BE DISMISSED IN ITS ENTIRETY.

A party may move for judgment on the pleadings, "[a]fter the pleadings are closed but within such time as not to delay trial." Fed. R. Civ. P. 12(c). When a motion for judgment on the pleadings is presented based on failure to state a claim upon which relief can be granted, the proper standard of review is that of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-12 (6th Cir. 2001); *Mixon v. Ohio*, 193 F.3d 389, 399-400 (6th Cir. 1999) ; *Curcio Webb, LLC v. Nat'l Benefit Programs Agency*, 367 F. Supp. 2d 1191, 1196 (S.D. Ohio 2005)(citing *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 11 (6th Cir. 1987), (holding "where the Rule 12(b)(6) defense is raised by a Rule 12(c) motion for judgment on the pleadings, we must apply the standard for a Rule 12(b)(6) motion in reviewing the district court's decision.").

Further, "[i]n reviewing the motion, [the court] must construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claim that would entitle him to relief." *Ziegler*, 249 F.3d at 512 (citing *Mixon*, 193 F.3d at 400.). In *Curcio Webb, Inc.*, the court stated:

> The Court must "construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). While the complaint need not specify every detail of a plaintiff's claim, it must give the defendant "fair notice of what the plaintiff's claim is and the ground upon which it rests." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (quoting *Conley*, 355 U.S. at 47). Though liberal, this standard of review requires more than the bare assertion of legal conclusions. *Allard v. Weitzman* (*In re DeLorean*

> *Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993). A complaint must contain either direct or inferential allegations with respect to all the material elements necessary to sustain a recovery under some viable legal theory. *Id.*

367 F. Supp. 2d at 1196. "A plaintiff is not required to plead the facts or elements of a claim." *Dunkin' Donuts, Inc, et al. v. Tejany & Tejany, Inc.*, 2006 U.S. Dist. LEXIS 2041 (N.D. Ill. 2006) (citing *Swierkiewicz v. Sorema,* 534 U.S. 506, 511, 112 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002)). "Dismissal is warranted only if 'it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Dunkin Donuts, Inc.*, 2006 U.S. Dist. LEXIS at 3 (citing *Conley*, 355 U.S. at 45-46)). "The 'suit should not be dismissed if it is possible to hypothesize facts, consistent with the complaint, that would make out the claim.'" *Dunkin Donuts, Inc.*, 2006 U.S. Dist. LEXIS at 3 (citing *Graehling v. Village of Lombard, Ill.*, 58 F.3d 295, 297 (7th Cir. 1995)). Accordingly, the proper standard for judgment on the pleadings is to use the standard for that of Rule 12(b)(6) motion, and to liberally construe the complaint in the plaintiff's favor, accepting factual allegations and permissible inferences as true.

Generally, a "motion to dismiss under Fed. R. Civ. P. 12(b)(6) is viewed with disfavor and is rarely granted." *Healthpoint, Ltd. v. Ethex Corp.*, 2001 U.S. Dist. LEXIS 25474, *14 (W.D.Tx. 2001). This is due to the fact that "the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." *American Honda Motor Corp., Inc. v. Motorcycle Information Network, Inc.*, 390 F. Supp. 2d 1170, 1175 (M.D.Fla. 2005) (*citing to Quality Foods de Centro Am. S.A. v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 995 (11th Cir. 1983)). "Liberal notice pleading standards embodied in Rule 8(a) 'do not require that a plaintiff specifically plead every element of a cause of action.'" [Citations omitted]. *American Honda Motor Corp., Inc.,* 390 F. Supp. 2d. at 1175.

Nor is a plaintiff required to "set out in precise detail the specific facts upon which he bases his claim." *Id.* at 1175; *see also Whitney Information Network, Inc. v. Xcentric Ventures, LLC*, 2005 U.S. Dist. LEXIS 24920, *2-3 (M.D.Fla. 2005).

As courts have consistently held when addressing a Rule 12(b)(6) motion, "[t]he only requirement is that a complaint allege the 'bare minimum facts necessary to put the defendant on notice of the claim so that [it] can file an answer.'" *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002). "Fair notice is 'that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial.'" *Wynder v. McMahon*, 360 F.3d 73, 79 (2d Cir. 2004) (citations omitted). As a result, a complaint need only contain "either *direct or inferential allegations* respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Id.* at 1175 (emphasis added). "[A]ll the [Federal] Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957) (citations omitted). So long as a complaint "'shows that the Plaintiff is entitled to any relief that the Court can grant, regardless of whether it asks for the proper relief,' it is sufficiently plead." *American Honda Motor Corp., Inc.,* 390 F. Supp.2d. at 1175 (citations omitted). As a result, a "complaint should not be dismissed unless it appears *beyond a doubt* that the plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *Klinger v. Weekly World News, Inc.*, 747 F. Supp. 1477, 1479 (S.D.Fla. 1990) (emphasis added).

Moreover, contrary to Defendants' arguments, the "issue in a Rule 12(b)(6) motion is not whether the plaintiff will ultimately prevail on his or her claims, but rather, whether the allegations contained in the complaint will be sufficient to allow discovery as to their proof."

Whitney Information Network, Inc., LLC, 2005 U.S. Dist. LEXIS at *3. A plaintiff is under no obligation to meticulously allege each and every fact that may support the elements of the various causes of action. *Perfect 10, Inc. v. Cybernet Adventures*, 167 F. Supp.2d 1114 (C.D.Ca. 2001) (*citing to Leatherman v. Terrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160 (1993)). It is sufficient that the factual allegations, when taken as true, provide the necessary inferences to establish a *prima facie* cause of action. *See American Honda Motor Corp., Inc.,* 390 F. Supp. 2d. at 1175.

In the instant matter, and as discussed more fully below, it is clear that the factual allegations of the Complaint are more than sufficient to establish a *prima facie* cause of action for each of Plaintiff's claims. Indeed, contrary to Defendants' argument, both the "direct and inferential" allegations of the Complaint establish the necessary elements of each asserted cause of action and provide Defendants with sufficient notice of the basis of each claim. As a consequence, the Complaint satisfies the liberal "notice pleading" standard and Defendants' motion should be dismissed.

The Complaint amply provides notice to defendants of claims upon which Plaintiff has valid and concrete relief.

ARGUMENTS

A. Plaintiff Has Set Forth A Valid Claim For Violations Of The Lanham Act.

"Under the liberal federal system of notice pleading, 'plaintiffs need not plead facts; they need not plead law; they plead claims for relief…Complaints initiate the litigation but need not cover everything necessary for the plaintiff to win; factual details and legal arguments come later. A complaint suffices if any facts consistent with its allegations, and showing entitlement to prevail, could be established by affidavit or testimony at a trial.'" *The Woman's Newspapers,* *LLC, et al. v. Cavanagh, et al.*, 2005 U.S. Dist. LEXIS 37468, 10 (N.D. Ill. 2005) (quoting *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005)). "Complaints need not spell out every element of a legal theory." *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 261 (7th Cir. 1998). In *The Woman's Newspaper*, the court stated that Rule 9 of the Federal Rules of Civil Procedure has a listing of causes of action that must be plead with particularity. *The Woman's Newspaper*, 2005 U.S. Dist. LEXIS at 9. Trade dress infringement is not a cause of action required under Rule 9 to be plead with particularity. *Id.* Accordingly, a plaintiff need not establish all facts and law necessary to establish a case of trade dress infringement because a motion to dismiss is not held to the same standard as a motion for summary judgment. Rather, a plaintiff need only plead claims for relief.

1. Plaintiff Establishes a Prima Facie Case of Trade Dress Infringement.

"To establish a prima facie case for trade dress infringement, a plaintiff must prove that its trade dress design is (a) inherently distinctive or has acquired distinctiveness through secondary meaning; and (b) is not functional." *Bayco Products, Ltd. v. Tap Enterprises, Inc. d/b/a Cummins Industrial Tools, Inc.*, 2005 U.S. Dist. LEXIS 12292, 8 (N.D. Tx. 2005) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769, 120 L. Ed. 2d 615, 112 S. Ct. 2753 (1992)). A plaintiff must also allege that there is a likelihood of confusion of between the protected trade dress and the infringing work. *Bayco Products, Ltd.*, 2005 U.S. Dist. LEXIS at 8.

In *Bayco Products*, the court held that the plaintiffs statements in the complaint were sufficient to establish a claim for trade dress infringement. The plaintiff stated that its works had distinctive features, and that it had also acquired secondary meaning. *Id.* at 9. Further Plaintiff stated that its works were not functional. *Id.* Lastly, the plaintiff stated that the defendant had misappropriated its protected trade dress by adopting a confusingly similar trade dress for its products. *Id.* The court held, "in light of these allegations, the court cannot say that it appears beyond doubt that Bayco can prove no set facts in support of its claim which would entitle it to relief." *Id.* These mere allegation are all that are necessary, and the case law shows that the federal notice pleading standards are quite liberal, thereby disfavoring movants for motions to dismiss for failure to state a claim upon which relief may be granted. *Bayco Products, Ltd.*, 2005 U.S. Dist. LEXIS at 2-3.

The Complaint states that Plaintiff designs and sculpts ornamental jewelry. A copy of the Complaint is attached as Exhibit "A." *See* Exhibit A, ¶ 12-14. Specifically, Plaintiff alleges, "Plaintiff is engaged in the sculpting, design, manufacture, marketing and sale of original ornamental jewelry designs, which include his singular and distinctive expression of wearable art from his Sportsmen's Wildlife Collection." *See* Exhibit A, ¶ 12. "Plaintiff's works are developed through the meticulous sculpturing, molding and casting in various media, including pewter, which express his individualized sportsman's and animal motifs and wildlife images." *See* Exhibit A, ¶ 13. Further, Plaintiff states "Plaintiff's Works have achieved great popularity amongst wildlife and animal enthusiasts, collectors and others through the United States, a large component of whom are concerned with the aesthetic appearance and quality of the jewelry purchased." *See* Exhibit A, ¶ 38. Plaintiff goes onto say that through Plaintiff's efforts in advertising and promoting the Works, Plaintiff is recognized by the general population and specialized groups as a distinctive artist. *See* Exhibit A, ¶ 39.

Accordingly, Plaintiff has asserted that its trade dress in the designs for the pins are protectable trade dress because they are inherently distinctive. In the alternative, however, Plaintiff alleges that its designs have over time been recognized by the public, thus acquiring secondary meaning. Even if Plaintiff did not specifically allege this element, a reasonable inference could be drawn from the allegations in the Complaint so that Plaintiff would fulfill the notice pleading requirement for the trade dress count.

Second, Plaintiff clearly states that the unique designs for the pins are nonfunctional and protectable. *See* Exhibit A, ¶ 40. As such, Plaintiff has fulfilled the second element of a prima facie case of trade dress infringement.

Third, Plaintiff has alleged that there is a likelihood of confusion between Plaintiff's protectable trade dress and Defendant's infringing works. "At all times herein mentioned, Defendants were and still are engaged in, among other things, direct competition with Plaintiff in the marketing, advertising, manufacture, distribution, and sale of, among other things, ornamental jewelry depicting various forms of animals and wildlife in pewter." *See* Exhibit A, ¶ 36. Further, Plaintiff alleges that Defendant copied its unique designs by duplicating molds. *See* Exhibit A, ¶ 41-42. Lastly, Plaintiff has alleged that Defendants have misappropriated Plaintiff's intellectual property rights by its acts. *See* Exhibit A, ¶ 45. These statements allege a likelihood of confusion between Plaintiff's unique designs, protected as trade dress, and Defendant's infringing products. Even if the allegation of likelihood of confusion is not set forth out right, an inference could be drawn that if Defendant is selling exact copies of Plaintiff's unique ornamental jewelry, then there will be a likelihood of confusion.

As such, judgment on the pleadings with respect to the second count for violations of the Lanham Act should be dismissed as they lack merit given the ample facts set forth showing a claim for trade dress infringement; and thus, showing there is a claim upon which relief may be granted by the Court.

B. Plaintiff Has Set Forth A Valid Claim For Accounting For All Gains, Profits, And Advantages.

The Copyright Act of 1976 provides:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the element of profits attributable to factors other than the copyrighted work.

17 U.S.C.A. § 504(b).

The statute entitles, in section 504(a), the Plaintiff to elect the great of its actual damages or defendant's profits, in section 504(b), or to elect statutory damages, under section 504(c). "There is of course only one way to determine which of two numbers is larger, and that is to ascertain both of those numbers. Hence the necessary corollary of Section 504(b) formulation—which applies whenever the copyright owner does not claim statutory damages—is that the owner is entitled to an accounting of the infringer's profits." *Respect Inc. et al., v. Committee On The Status of Women, d/b/a Project Respect*, 821 F. Supp. 531 (N.D. Ill. 1993). In *Respect*, the court found defendant had infringed the plaintiff's copyrights and was presented with a motion for accounting and for imposition of a constructive trust against the defendant. The court held that the Copyright Act dictates an accounting in order for a plaintiff to determine which type of damages to elect. The court did not, and nor is it found in the Copyright Act, that a plaintiff must show any type of relationship between the parties as a prerequisite to receiving accounting. Moreover, even if there were such a standard, Plaintiff has complied with the liberal federal notice pleading requirements in asserting this claim.

The Lanham Act provides:

> When a violation of any right of the registrant of a mark in the Patent and Trademark Office, or a violation under 1125(a) of this title, shall have been

> established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction.

15 U.S.C.A. § 1117(a).

The plaintiff need not show that plaintiff and defendants are in direct competition for a court to grant accounting under a claim for violations of the Lanham Act. *Monsanto Chemical Co. v. Perfect Fit Prods. Mfg. Co., Inc.*, 349 F.2d 389 (2d Cir. 1965). In *Monsanto*, the district court did not award accounting to the plaintiff after a finding of trademark infringement requiring that accounting be awarded if the parties were direct competitors. *Id.* at 391. The Second Circuit, overruling prior decisions that enunciated such a requirement, stated that trademark infringement should be viewed under the theory that trademarks are property. "Taking this view, the justification for an accounting is found in the principles of unjust enrichment traditionally applicable where property is used for profit without the owner's permission, and, if the view is carried to its logical conclusion, an accounting should be awarded automatically in most cases." *Id.* at 392. The Second Circuit found support for this proposition in a Supreme Court cases, where the Court stated, "[t]he right to use a trademark is recognized as a kind of property, of which the owner is entitled to the exclusive enjoyment to the extent that it has been actually used." *Monsanto*, 349 F.2d at 393 (quoting *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 259, 36 S. Ct. 269, 272, 60 L. Ed. 629 (1916)). Thus, under trademark law, other than considerations under principles of equity, as articulated in the statute, a plaintiff need not show any relationship between the parties to be awarded an accounting of defendant's gains, profits, and advantages.

Even if Plaintiff was charged with establishing a relationship between Plaintiff and Defendants, Plaintiff has set forth such a relationship in the Complaint. Plaintiff has alleged that Defendants have sold copies of their protected pins. As a direct infringer under both the Copyright Act and Lanham Act, Plaintiff and Defendant are direct competitors because Defendant is selling copies of Plaintiff's pins, which clearly are directed to the same consumers. *See* Exhibit A, ¶ 20-23, 30-33, 45-46, and 52.

Furthermore, the cases cited by Defendant state "[I]n order to survive a motion for judgment on the pleadings, a claim for an accounting, like any claim, must set forth operative facts which when construed in the claimant's favor, establish a right to the requested relief." *Fontbank, Inc. v. CompuServe, Inc.*, 138 Ohio App. 3d 801, 814 (Franklin Cty. 2000). In the case of accounting for both copyright infringement and violations of the Lanham Act, the Plaintiff need only assert the claim for accounting to satisfy the notice pleading requirement. Plaintiff is not required make out a case as to whether accounting is appropriate at this early stage of the case.

Therefore, Plaintiff has set forth sufficient facts to satisfy the liberal notice pleading requirements as stated in Rule 8(a) for the third cause of action for accounting.

C. Plaintiff's Cause Of Action For Unfair Competition Is Not Preempted By the Section 301 Of The Copyright Act.

The Sixth Circuit articulated the test for preemption of state law claims by the Copyright Act of 1976, under section 301. *Wrench L.L.C. v. Taco Bell Corp.*, 256 F.3d 446 (6th Cir. 2001), *cert. denied* 534 U.S. 1114. In *Wrench*, the court stated:

> [A] state common law or statutory claim is preempted if: (1) the work is within the scope of the "subject matter of copyright," as specified in 17 U.S.C. §§ 102, 103; and, (2) the rights granted under state law are equivalent to any exclusive rights within the scope of federal copyright as set out in 17 U.S.C. § 106.

Id. at 453 (citations omitted).

In *Curcio Webb*, the court followed the standard in deciding the defendant's motion for judgment on the pleadings, where the defendant raised the preemption issue with respect to plaintiff's claims for state law unfair competition and misappropriation. *Curcio Webb*, 367 F. Supp. 2d at 1209. In that case, plaintiff alleged unfair competition and misappropriation because of defendant's copying for plaintiff's copyrighted documents. *Id.* The court found that the copyrighted documents fell under the scope of the Copyright Act, and therefore the first prong was satisfied. *Id.* at 1211. With respect to the second prong of the preemption test, the court stated that if an extra or different element is required by the state law claim, which changes the nature of the action, then the equivalency element is not met. *Curcio Webb*, 367 F. Supp. 2d at 1212 (citing *Stromback v. New Line Cinema*, 384 F.3d 283, 301 (6th Cir. 2004)(quoting *Wrench*, 256 F.3d at 456)(citations omitted)). Plaintiff apparently admitted that its claims for state law unfair competition and misappropriation were based on copying of the copyrighted documents. Thus, the court had no trouble concluding there was equivalency between the state law claim and the federal copyright claims. *Id.* at 1213.

Importantly, the court, in *Curcio Webb*, notes "asserting [] state law claims for unfair competition that are premised on "passing off" **are not preempted** under the Copyright Act." *Curcio Webb*, 367 F. Supp. 2d at 1213, n39 (citing Nimmer On Copyright, §1.01[B][1][e]) (emphasis added). Plaintiff in this case clearly alleges its claim of unfair competition on passing off. "Upon information and belief and at various times, but in any event prior to 2003, and continuously thereafter, Defendants have been advertising, distributing, selling, and otherwise marketing the infringing cast pieces, and have thereby been engaging in unfair and deceptive trade practices by palming off the infringing Works as original Works." *See* Exhibit A, ¶ 54.

Plaintiff is alleging an unfair competition claim based on passing off of goods. Passing off of goods requires different elements than the elements necessary for copyright infringement because passing off requires the additional element of representation to the public that the goods are those of someone else. Plaintiff explicitly states that Defendant is palming off the infringing works as original works created by Plaintiff. Therefore, there is no equivalency of the state law unfair competition claim and the copyright infringement claim to warrant preemption because there is an additional and/or different element for establishing a claim of passing off so as to change the nature of the action. *See Curcio Webb*, 367 F.3d at 1213, n39; *see also Wrench*, 256 F.3d at 456.

Therefore, preemption of the fourth cause of action for unfair competition would not be proper because the equivalency prong is not satisfied in accordance with the test articulated in *Wrench*.

D. Plaintiff Has Set Forth A Valid Claim For Fraud/Misrepresentation.

Under Rule 9(b) of the Federal Rules of Civil Procedure, claims based on fraud or mistake are under a "heightened standard of pleading." Specifically, Rule 9(b) states, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Particularity, however, does not require a detailed fact pleading for fraud claims. *Arral Indus., Inc. v. Touch Entm't, Inc., et al.*, 2000 U.S. Dist. LEXIS 2306, 8 (S.D. Fl. 2000) (citing *Okla. v. Children's Shelter, Inc.*, 604 F. Supp. 867, 870 (W.D. Okla. 1985)(quoting *In re longhorn Securities Litigation*, 573 F. Supp. 255, 263 (W.D. Okla. 1983)). In *Arral Indus.*, the court further stated that Rule 9(b) must be read in conjunction with Rule 8's notice pleading requirement and that Rule 9(b) is satisfied when fraud is alleged with sufficient information to allow the person charged with fraud to "have a reasonable opportunity to answer the complaint and adequate information to frame a response." *Id.* at 9 (citations omitted).

In the instant case, Defendants assert that Plaintiff did not allege justifiable reliance upon the representation of concealment. Further, Defendants assert that Plaintiff does not allege any misrepresentation by Defendants. While allegations of fraud have a heightened standard, Rule 9(b) does not require a detailed fact pleading of claims of fraud. Plaintiff fully incorporates all the allegations and facts stated in the Complaint in the Fifth Cause of Action for Fraud/Misrepresentation. *See* Exhibit A, ¶ 56. The Complaint is replete with information sufficient for Defendants to answer Plaintiff's claim of fraud. Plaintiff states that Plaintiff's Works are developed through meticulous sculpturing, molding and casting in various media, which express his individualized sportsman's and animal motifs and wildlife images. *See* Exhibit A, ¶ 13. Plaintiff states Defendants' unlawful actions, including acts of fraud by marketing, selling, and advertising infringing works, and also using molds and removing copyright notices during the molding/casting process. *See* Exhibit A, 20-23. Further, Plaintiff states that Defendants should have full knowledge that the cast pieces were sole property of the Plaintiff; despite that knowledge, Defendants fraudulently advertised and represented they were the original authors of the original works. *See* Exhibit A, ¶ 57-58. Accordingly, these statements provide ample information upon which Defendants can frame a response. *See Arral Indus., Inc.*, 2000 U.S. Dist. LEXIS at 8.

Therefore, Defendants' arguments that Plaintiff does not state a claim upon which relief may be granted are without merit, as Defendant insists on holding Plaintiff to a standard of pleading fraud that is more than the requirements of Rule 9(b).

CONCLUSION

For the reasons stated in this Memorandum of Law, George G. Harris a/k/a George G. Harris' Wildlife Collection, respectfully submits that all claims are well pleaded in compliance with the Rules 8 and 9 of the Federal Rules of Civil Procedure. Accordingly, Plaintiff requests the Court deny Defendant's Motion for Judgment on the Pleadings as it is without merit.

DATED: April 3, 2006

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By: ____*/s/ William M. Mattes*__________

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CERTIFICATE OF SERVICE

I certify that on April 3, 2005 , I filed a copy of the foregoing document with the Clerk of the Court via the CM/ECF system which gave notice to all counsel of record.

By: ____*/s/ William M. Mattes*__________

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